Morello Sdn Bhd v Jaques (International) Sdn Bhd

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–490 OF 1993
JEMURI SERJAN CHIEF JUDGE (SABAH & SARAWAK), MOHAMED AZMI AND EDGAR JOSEPH JR FCJJ
8 MARCH 1995

Contract *— Deposit — Unpaid deposit — Whether recoverable — Express stipulation that 10% deposit payable on signing of contract — Subsequent agreement of seller to accept late payment — Agreement terminated on grounds of breach — Whether vendor entitled to sue for recovery of unpaid deposit — Whether buyer's contractual obligation to pay deposit vests indubitable right in vendor — Whether proof of damage necessary — Contracts Act 1950 ss 74 & 75*

Contract *— Deposit — Unpaid deposit — Whether true deposit or instalment — Whether unconditional promise to pay — Label attached by the parties — Reasonableness of sum — Whether payment loses character of deposit if paid subsequent to signing of contract — Whether payment must have dual purpose as guarantee of performance and part payment of purchase price — Contracts Act 1950 ss 74 & 75*

Contract *— Damages — Mitigation — Unpaid deposit — Whether there is duty to mitigate where claim is for unpaid deposit*

Civil Procedure *— Pleadings — Statement of claim — Prayer for damages for repudiation — Whether court could allow recovery of unpaid deposit instead — Whether opposing party taken by surprise*

The appellant ('the buyer') entered into an agreement with the respondent ('the seller') to purchase a Jaques crushing plant for RM1,167,000. It was stipulated in the agreement that the buyer was to pay the seller RM116,700, being 10% of the purchase price, as a deposit upon signing the agreement and the balance in four subsequent payments. The buyer requested for a few days to pay up the deposit but asked the seller, in view of the urgency of commencement, to proceed with the contract, which it did. When the buyer failed to pay the deposit, the seller terminated the agreement and sued the buyer for RM116,700 as 'damages for repudiation' and consequential reliefs. The buyer alleged that it was specifically agreed by both parties that no payments would be made on signing the agreement as, inter alia, the title for the quarry where the plant was to be installed had not been released to the buyer. The trial judge found that the deposit amount was the proper measure of damages and allowed the seller's claim. The buyer appealed, alleging that: (i) the initial payment of 10% although expressly stipulated as a deposit in the agreement was not a true deposit and there being no proof of loss, the trial judge ought to have dismissed the suit; and (ii) the seller had not prayed for recovery of the unpaid deposit but for damages for repudiation.

Held by a majority, dismissing the appeal (Mohamed Azmi FCJ dissenting):

(1) (Per **Edgar Joseph Jr FCJ**) In determining whether money has been paid by way of deposit or by way of part payment, the court must have regard to the terms of the agreement as a whole and the surrounding circumstances.

(2) (Per **Edgar Joseph Jr FCJ**) Considerable weight is to be given to the label attached to the initial payment by the parties, especially where, as in this case, the agreement was between two incorporated companies, engaged in trade, both commercially autonomous, fully informed of all the relevant facts, with free access to legal advice, and having regard to the degree of formality in the wording of the agreement.

(3) (Per **Edgar Joseph Jr FCJ**) The reasonableness of the sum stipulated as a deposit in a contract is one of the most significant factors in determining whether or not it is a true deposit. A sum within the range of 10% of the purchase price would be considered reasonable. Furthermore, the agreement distinguished between the initial payment of 10% expressly stipulated as a deposit and the four subsequent payments which were clearly instalment payments.

(4) (Per **Edgar Joseph Jr FCJ**) The fact that the seller had, subsequent to the agreement, agreed to accept late payment of the deposit did not mean that the promised initial payment lost its character of a deposit. It followed that a deposit need not be paid on signing of the contract.

(5) (Per **Edgar Joseph Jr FCJ**) The effect in law of the contractual obligation to pay a deposit is to vest an indubitable right in the vendor to receive the deposit upon the contract coming into existence notwithstanding the subsequent termination. This is because the deposit is given as security for the performance of the contract. When a deposit is forfeited, it represents damages for a vendor for the loss of his bargain. Similarly, a vendor is entitled to sue for recovery of an unpaid deposit upon termination for breach. Therefore, proof of damage is not necessary.

(6) (Per **Edgar Joseph Jr FCJ**) Although the seller's statement of claim sought damages for repudiation, it was clear that the seller was seeking recovery of the unpaid deposit. Furthermore, counsel for the buyer knew perfectly well what the seller's case was and he was not taken by surprise.

(7) (Per **Edgar Joseph Jr FCJ**) The right to recover an unpaid deposit or to forfeit a deposit which has been paid, allows a vendor to obtain compensation without proving his damage and so there is no duty to mitigate. Therefore, the fact that a vendor might resell at a profit does not preclude him from exercising his right of forfeiture or of recovery of an unpaid deposit.

(8) (Per **Edgar Joseph Jr FCJ**) The fact that the agreement in this case did not provide for forfeiture of the deposit in the event of breach by the buyer did not preclude the seller from recovering the unpaid deposit.

(9) (Per **Edgar Joseph Jr FCJ**) As the sum sought to be recovered was a genuine deposit and the amount thereof reasonable, relief against forfeiture under s 75 of the Contracts Act 1950 ('the Act') would not be granted.

Cases referred to

Bot v Ristevski [1981] VR 120 (folld)
Chard v Willett [1933] QSR 182 (folld)
Coates v Sarich [1964] WAR 2 (refd)
Connecticut Fire Insurance Co v Kavanagh [1892] AC 473 (refd)
Damon Compania Naviera SA v Hapag-Lloyd International SA [1985] 1 All ER 475; [1985] 1 WLR 435 (folld)
Dewar v Mintoft [1912] 2 KB 373 (folld)
Donaghey v O'Brien & Co [1966] 2 All ER 822; [1966] 1 WLR 1170 (refd)
Farrant v Leburn [1970] WAR 179 (folld)
Harrison v Holland [1922] 1 KB 211 (refd)
Hinton v Sparkes (1867–68) 3 LRCP 161 (folld)
Howe v Smith (1884) 27 Ch D 89 (folld)
Johnson v Agnew [1980] AC 367; [1979] 1 All ER 883; [1979] 2 WLR 487 (folld)
Johnson v Jones [1972] NZLR 313 (refd)
Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89 (folld)
Lowe v Hope [1970] Ch 94; [1969] 3 All ER 605; [1969] 3 WLR 582 (distd)
Lyon v Magnet Nominees Pty Ltd [1978] VR 673 (distd)
Mayson v Clouet [1924] AC 980 (refd)
McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457 (folld)
Schuler (L) AG v Wickman Machine Tool Sales Ltd [1974] AC 235; [1973] 2 All ER 39; [1973] 2 WLR 683 (folld)
Shuttleworth v Clews [1910] 1 Ch 176 (folld)
Song Toh Chu v Chan Kiat Neo [1973] 2 MLJ 206 (folld)
Soper v Arnold (1889) 14 App Cas 429 (folld)
Stockloser v Johnson [1954] 1 QB 476; [1954] 1 All ER 630; [1954] 2 WLR 439 (refd)

(10) (Per **Mohamed Azmi FCJ**, dissenting) A claim for paid or unpaid deposit is based on whether the amount claimed was unconditionally due and payable prior to the defendant's repudiation, and whether the consideration for the promise had been executed. The deposit must be in the nature of a true deposit and there must be an unconditional promise to pay the deposit immediately because the agreement to pay was not in consideration of the goods sold but was in consideration of the

contract. Thus, where the promise to pay immediately on signing of the contract is conditional, as in this case, a claim for an unpaid deposit must necessarily fail. A

(11) (Per **Mohamed Azmi FCJ**) To qualify as a true deposit, the contract should contain words or expressions capable of being construed to mean that the parties intended the deposit to be for a dual purpose not only as a guarantee of performance, but also as part payment towards the purchase price. As such, whether a deposit is a true deposit cannot depend on the mere labelling of the word but must depend on the construction of the words and expression used in the particular contract. B C

(12) (Per **Mohamed Azmi FCJ**) The agreement did not indicate either expressly or by necessary implication that the deposit was also earnest money for performance. Its only purpose was as a down payment towards the purchase price to be paid when the contract was signed. As the promise to pay immediately was waived, the word 'deposit' in cl 3 of the agreement could not in all probability have been intended as a true deposit. At the very minimum, the buyer's promise to pay was conditional. D

(13) (Per **Mohamed Azmi FCJ**) At the trial, the issues whether the promise to pay was conditional, whether there was postponement of payment and whether the word 'deposit' in the agreement was a true deposit were not argued or sufficiently considered. Therefore, the seller's claim could not be founded on unpaid deposit, but remained as a claim for repudiation as pleaded. E

(14) (Per **Mohamed Azmi FCJ**) The seller had failed to discharge the onus of proof of establishing the existence of a true deposit. Therefore, it had a duty to prove its loss under s 74 of the Act. The court should not be persuaded to read the sum of RM116,700 as agreed liquidated general damages or as a claim for recovery of unpaid deposit. Nor could the seller ask the court to treat the sum labelled as a deposit as a means of assessing general damages without proof. F G

(15) (Per **Mohamed Azmi FCJ**) The trial judge had ignored the important distinction between a claim for damages for breach of contract and a claim for recovery of unpaid deposit and had treated the two causes of action as interchangeable. The error that the judge committed was to adopt the sum of RM116,700 as the true measure of damage without the seller proving any loss under s 74 of the Act. Thus, after correctly holding that s 75 of the Act did not apply, the trial judge ought to have applied s 74 and required damage to be proved. He should not have treated the sum of RM116,700 as liquidated damages or as the measure of damage for breach of contract without proof of loss. H I

Obiter:

(Per **Mohamed Azmi FCJ**) A forfeiture is only possible when the deposit has been paid by the buyer at the time when the

repudiation of the contract is accepted by the seller. But the law governing a claim for unpaid deposit on the basis that the measure of damage is the amount of deposit agreed to be paid, is a comparatively new development of the law on assessment of damage and is still unsettled in other common law jurisdictions. It ought not to be imported hastily to this country without any regard to the pleadings and to s 74 of the Act which requires proof of loss or damage.

Cases referred to

Bonham-Carter v Hyde Park Hotel Ltd [1948] WN 89 (folld)
Central Malaysia Development & Co Ltd v Chin Pak Chin [1967] 2 MLJ 174 (refd)
Damon Compania Naviera SA v Hapag-Lloyd International SA [1985] 1 All ER 475; [1985] 1 WLR 435 (refd)
Farrant v Leburn [1970] WAR 179 (refd)
Ford v Beech (1848) 11 QB 852 (folld)
Hadmor Productions v Hamilton [1983] 1 AC 191; [1982] 1 All ER 1042; [1982] 2 WLR 322 (folld)
Howe v Smith (1884) 27 Ch D 89 (refd)
Karuppiah v Petaling Garden Co Sdn Bhd [1972] 1 MLJ 11; [1972] 1 MLJ 173, FC (refd)
Khoo Teck Puat & Anor, Tan Sri v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777 (folld)
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428 (folld)
Lee Sau Kong v Leow Cheng Chiang [1961] MLJ 17 (folld)
Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89, PC; [1969] 2 MLJ 253, FC (refd)
Lyon v Magnet Nominees Pty Ltd [1978] VR 673 (folld)
Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416 (folld)
Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 (folld)
Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd [1987] 2 MLJ 711 (refd)

[Bahasa Malaysia summary

Perayu ('pembeli') telah mengikat satu perjanjian dengan responden ('penjual') untuk membeli sebuah loji penghancur Jaques pada harga RM1,167,000. Adalah disyaratkan di dalam perjanjian itu bahawa pembeli dikehendaki membayar kepada penjual RM116,700, iaitu 10% harga belian, sebagai deposit apabila perjanjian itu ditandatangani dan bakinya dalam empat bayaran berikutnya. Pembeli telah meminta supaya diberikan tempoh beberapa hari untuk membayar deposit itu tetapi meminta penjual untuk meneruskan kontrak itu, memandangkan keperluan memulakan kerja dengan segera, dan penjual telah berbuat demikian. Apabila pembeli gagal membayar deposit itu, penjual menamatkan perjanjian tersebut dan mendakwa

pembeli untuk jumlah RM116,700 sebagai 'ganti rugi untuk penolakan' dan relief lain. Pembeli mengatakan bahawa telah dipersetujui dengan khusus oleh kedua-dua pihak bahawa tiada pembayaran yang akan dibuat apabila perjanjian itu ditandatangani kerana, antara lain, hakmilik kuari di mana loji tersebut akan dipasang masih belum dikeluarkan kepada pembeli. Hakim perbicaraan telah mendapati bahawa jumlah deposit itu adalah gambaran ganti rugi yang berpatutan dan membenarkan tuntutan penjual. Pembeli telah membuat rayuan, mengatakan bahawa: (i) pembayaran permulaan sebanyak 10% itu walaupun disyaratkan dalam perjanjian dengan nyata sebagai suatu deposit bukanlah satu deposit yang benar dan dengan tiadanya bukti kerugian, hakim perbicaraan harus menolak guaman itu; dan (ii) penjual tidak memohon untuk mendapatkan deposit yang belum dibayar itu tetapi untuk ganti rugi untuk penolakan.

Diputuskan oleh majoriti, menolak rayuan itu (Mohamed Azmi HMP bertentangan):

(1) (Oleh **Edgar Joseph Jr HMP**) Dalam menentukan sama ada wang dibayar secara deposit atau secara pembayaran sebahagian, mahkamah perlu mengambil berat terhadap terma-terma perjanjian itu secara keseluruhan dan keadaan sekelilingnya.

(2) (Oleh **Edgar Joseph Jr HMP**) Kepentingan besar perlu diberi kepada label yang diberikan kepada pembayaran permulaan itu oleh pihak-pihak tersebut, terutamanya di mana, seperti dalam kes ini, perjanjian itu adalah di antara dua syarikat yang diperbadankan, yang terlibat dalam perniagaan, kedua-duanya berautonomi komersil, diberitahu sepenuhnya tentang semua fakta, dengan kebebasan mendapat nasihat guaman dan dengan mengambil berat terhadap darjah keformalan dalam susunan kata perjanjian itu.

(3) (Oleh **Edgar Joseph Jr HMP**) Kemunasabahan jumlah yang disyaratkan sebagai deposit dalam sesuatu perjanjian adalah salah satu faktor yang paling penting dalam menentukan sama ada ianya satu deposit benar. Satu jumlah dalam lingkungan 10% harga belian akan dianggap sebagai jumlah yang munasabah. Lagipun, perjanjian itu telah membezakan antara pembayaran permulaan sebanyak 10% yang disyaratkan dengan nyata sebagai deposit dan empat bayaran berikutnya yang jelas adalah bayaran ansuran.

(4) (Oleh **Edgar Joseph Jr HMP**) Hakikat bahawa penjual telah bersetuju menerima bayaran lewat deposit itu, selepas perjanjian itu, tidak bermakna bahawa bayaran permulaan yang telah dijanjikan itu hilang cirinya sebagai satu deposit. Semestinya ia bermakna deposit itu tidak perlu dibayar apabila perjanjian itu ditandatangani.

(5) (Oleh **Edgar Joseph Jr HMP**) Kesan di sisi undang-undang sesuatu kewajipan kontraktual untuk membayar deposit adalah

untuk meletakhak suatu hak yang tidak dapat diragukan lagi ke atas penjual untuk menerima deposit itu apabila kontrak tersebut mula wujud walaupun terdapat penamatan berikutnya. Ini adalah kerana deposit itu dibayar sebagai jaminan untuk pelaksanaan kontrak itu. Apabila sesuatu deposit dirampas, ia merupakan ganti rugi bagi penjual untuk kehilangan perjanjiannya. Begitu juga, seorang penjual berhak mendakwa untuk mendapatkan deposit yang belum dibayar apabila kontrak itu ditamatkan kerana terdapat kemungkiran. Dengan itu, bukti kehilangan adalah tidak perlu.

(6) (Oleh **Edgar Joseph Jr HMP**) Walaupun pernyataan tuntutan penjual memohon untuk ganti rugi untuk penolakan, adalah jelas bahawa penjual sedang menuntut deposit yang belum dibayar itu. Lagipun, peguambela untuk pembeli betul-betul tahu apakah kes penjual dan beliau tidak terkejut.

(7) (Oleh **Edgar Joseph Jr HMP**) Hak untuk mendapatkan sesuatu deposit yang belum dibayar atau melucut hak sesuatu deposit yang telah dibayar, membolehkan penjual mendapatkan pampasan tanpa membuktikan kerugiannya dan dengan itu tiada kewajipan untuk mengurangkan kerugiannya. Oleh itu, hakikat bahawa penjual mungkin menjual semula dengan keuntungan tidak akan menghalang beliau daripada menggunakan haknya untuk melucut hak atau mendapatkan balik deposit yang belum dibayar.

(8) (Oleh **Edgar Joseph Jr HMP**) Hakikat bahawa perjanjian di dalam kes ini tidak memperuntukkan bahawa deposit itu boleh dilucut hak sekiranya berlaku kemungkiran oleh pembeli tidak menghalang penjual daripada mendapatkan deposit yang belum dibayar itu.

(9) (Oleh **Edgar Joseph Jr HMP**) Oleh kerana jumlah yang cuba didapatkan balik oleh penjual adalah deposit yang tulin dan jumlahnya adalah munasabah, relief terhadap pelucuthakan di bawah s 75 Akta Kontrak 1950 ('Akta itu') tidak dibenarkan.

(10) (Oleh **Mohamed Azmi HMP**, bertentangan) Sesuatu tuntutan untuk deposit yang telah dibayar atau yang belum dibayar adalah berdasarkan kepada sama ada jumlah yang dituntut itu perlu dibayar tanpa syarat sebelum penolakan oleh defendan, dan sama ada balasan untuk janji itu telah dilaksanakan. Deposit itu harus bersifat satu deposit benar dan mesti terdapat satu janji tanpa syarat untuk membayar deposit tersebut dengan segera kerana perjanjian untuk membayar bukanlah balasan untuk barangan yang dijual tetapi balasan untuk kontrak tersebut. Oleh itu, di mana janji untuk membayar sebaik sahaja kontrak ditandatangani itu adalah bersyarat, sepertimana dalam kes ini, sesuatu tuntutan untuk deposit yang belum dibayar semestinya gagal.

(11) (Oleh **Mohamed Azmi HMP**) Untuk layak menjadi satu deposit benar, kontrak tersebut perlu mengandungi perkataan atau ungkapan yang dapat ditafsirkan sebagai bermaksud bahawa pihak-pihak yang terlibat berniat supaya deposit itu berdwi-tujuan bukan sahaja sebagai gerenti pelaksanaan, tetapi juga sebagai bayaran sebahagian terhadap harga belian. Dengan itu, sama ada deposit itu adalah deposit benar tidak boleh berdasarkan hanya kepada label yang diberikan kepada perkataan itu tetapi mesti bergantung pada pentafsiran perkataan dan ungkapan yang digunakan di dalam sesuatu kontrak tertentu.

(12) (Oleh **Mohamed Azmi HMP**) Perjanjian itu tidak menunjukkan secara nyata mahupun secara implikasi yang perlu bahawa deposit itu juga merupakan wang cengkeram untuk pelaksanaan. Tujuannya adalah semata-mata sebagai bayaran pendahuluan terhadap harga belian yang perlu dibayar apabila kontrak tersebut ditandatangani. Oleh kerana janji untuk membayar dengan segera itu telah diketepikan, perkataan 'deposit' di dalam fasal 3 perjanjian itu besar kemungkinannya tidak dimaksudkan sebagai deposit benar. Pada tahap paling minimum, janji pembeli itu adalah janji bersyarat.

(13) (Oleh **Mohamed Azmi HMP**) Dalam perbicaraan itu, isu-isu sama ada janji untuk membayar itu adalah bersyarat, sama ada terdapat penangguhan bayaran dan sama ada perkataan 'deposit' dalam perjanjian itu adalah deposit benar tidak dihujah atau dipertimbangkan dengan mencukupi. Dengan itu, tuntutan penjual tidak boleh berasaskan pada deposit yang belum dibayar, tetapi tetap kekal sebagai suatu tuntutan untuk penolakan sepertimana yang dipohon.

(14) (Oleh **Mohamed Azmi HMP**) Penjual telah gagal melunaskan tanggungjawabnya untuk mengemukakan bukti untuk membuktikan kewujudan satu deposit benar. Dengan itu, ia mempunyai kewajipan untuk membuktikan kerugiannya di bawah s 74 Akta itu. Mahkamah tidak harus diyakinkan untuk mentafsirkan jumlah sebanyak RM116,700 sebagai ganti rugi umum jumlah tertentu yang dipersetujui atau sebagai suatu tuntutan untuk mendapatkan deposit yang belum dibayar. Penjual juga tidak boleh meminta mahkamah menganggap jumlah yang dilabel sebagai deposit itu sebagai satu cara untuk mentaksirkan ganti rugi umum tanpa bukti.

(15) (Oleh **Mohamed Azmi HMP**) Hakim perbicaraan telah tidak menghiraukan perbezaan di antara satu tuntutan untuk ganti rugi bagi kemungkiran kontrak dan satu tuntutan untuk mendapatkan deposit yang belum dibayar dan telah menyifatkan kedua-dua kausa tindakan tersebut sebagai boleh ditukar ganti. Kesilapan yang hakim telah buat adalah untuk mengambil jumlah RM116,700 itu sebagai ukuran benar kerosakan tanpa penjual membuktikan sebarang kerugian di bawah s 74 Akta itu. Dengan itu, setelah memutuskan dengan betul bahawa s 75 Akta itu

tidak terpakai, hakim perbicaraan sepatutnya menggunakan s 74 dan menghendaki kerosakan dibuktikan. Beliau tidak sepatutnya menyifatkan jumlah RM116,700 itu sebagai ganti rugi jumlah tertentu atau sebagai ukuran kerosakan untuk kemungkiran kontrak tanpa bukti kerugian.

Obiter:

(Oleh **Mohamed Azmi HMP**) Sesuatu pelucuthakan hanya boleh dilakukan apabila deposit itu telah dibayar oleh pembeli pada ketika penolakan kontrak itu diterima oleh penjual. Tetapi undang-undang yang mengawal sesuatu tuntutan untuk deposit yang belum dibayar berdasarkan alasan bahawa ukuran kerosakan ialah jumlah deposit yang dipersetujui untuk dibayar, adalah secara perbandingan satu perkembangan undang-undang yang baru mengenai taksiran kerosakan dan masih belum selesai di bidang kuasa common law yang lain. Ia tidak seharusnya diimport secara tergesa-gesa ke dalam negara ini tanpa mengambil berat terhadap pliding dan kepada s 74 Akta itu yang memerlukan bukti kerugian atau kerosakan.]

Notes

For cases on forfeiture of deposits, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1496–1505.

For cases on statements of claim, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2640–2648.

Complete list of cases referred to

Bonham-Carter v Hyde Park Hotel Ltd [1948] WN 89
Bot v Ristevski [1981] VR 120
Central Malaysia Development & Co Ltd v Chin Pak Chin [1967] 2 MLJ 174
Chard v Willett [1933] QSR 182
Coates v Sarich [1964] WAR 2
Connecticut Fire Insurance Co v Kavanagh [1892] AC 473
Damon Compania Naviera SA v Hapag-Lloyd International SA [1985] 1 All ER 475; [1985] 1 WLR 435
Dewar v Mintoft [1912] 2 KB 373
Donaghey v O'Brien & Co [1966] 2 All ER 822; [1966] 1 WLR 1170
Farrant v Leburn [1970] WAR 179
Ford v Beech (1848) 11 QB 852
Hadmor Productions v Hamilton [1983] 1 AC 191; [1982] 1 All ER 1042; [1982] 2 WLR 322
Harrison v Holland [1922] 1 KB 211
Hinton v Sparkes (1867–68) 3 LRCP 161
Howe v Smith (1884) 27 Ch D 89
Johnson v Agnew [1980] AC 367; [1979] 1 All ER 883; [1979] 2 WLR 487
Johnson v Jones [1972] NZLR 313

Karuppiah v Petaling Garden Co Sdn Bhd [1972] 1 MLJ 11; [1972] 1 MLJ 173, FC
Khoo Teck Puat & Anor, Tan Sri v Plenitude Holdings Sdn Bhd [1994] 3 MLJ 777
Lee Ah Chor v Southern Bank Bhd [1991] 1 MLJ 428
Lee Sau Kong v Leow Cheng Chiang [1961] MLJ 17
Linggi Plantations Ltd v Jagatheesan [1972] 1 MLJ 89, PC; [1969] 2 MLJ 253, FC
Lowe v Hope [1970] Ch 94; [1969] 3 All ER 605; [1969] 3 WLR 582
Lyon v Magnet Nominees Pty Ltd [1978] VR 673
Mayson v Clouet [1924] AC 980
McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457
Muniandy & Anor v Muhammad Abdul Kader & Ors [1989] 2 MLJ 416
Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360
Schuler (L) AG v Wickman Machine Tool Sales Ltd [1974] AC 235; [1973] 2 All ER 39; [1973] 2 WLR 683
Shuttleworth v Clews [1910] 1 Ch 176
Song Toh Chu v Chan Kiat Neo [1973] 2 MLJ 206
Soper v Arnold (1889) 14 App Cas 429
Stockloser v Johnson [1954] 1 QB 476; [1954] 1 All ER 630; [1954] 2 WLR 439
Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd [1987] 2 MLJ 711

Legislation referred to

Contracts Act 1950 ss 74(1), (2), 75

Shan Gnasalingam (*Daim & Gamany*) for the appellant.
Wong Ming (*Zairina Loh & Wong*) for the respondent.

Cur Adv Vult

Edgar Joseph Jr FCJ (delivering the majority judgment of the court): In this appeal, the essential facts which are not in dispute may be shortly stated.

By an agreement in writing dated 13 September 1984 ('the agreement'), entered into by the respondent/plaintiff ('the seller') and the appellant/defendant ('the buyer'), the seller had agreed to sell to the buyer and to install a Jaques crushing plant at the premises of the buyer at Pedas, Negeri Sembilan, at a price of RM1,167,000.

By cl 3 of the agreement, the buyer had agreed to pay to the seller an initial sum of RM116,700, being 10% of the purchase price, expressly stipulated therein as a deposit, to be paid upon signing the agreement.

It is noteworthy, in view of the discussion which follows, that the agreement distinguishes between the initial payment of the sum of

A RM116,700 expressly stipulated in cl 3 therein as a 'deposit', and payment of four subsequent sums, namely, RM408,450 'on delivery of prime equipment, ie all crushers and screens in this project'; RM408,450 'on delivery of the essential steel structures for crushers and screens support, chuteworks, conveyor frames and ancillaries'; RM175,050 'on completion
B of erection and ready to test and commissioning'; and RM58,350 '30 days after commissioning and acceptance of the plant'.

The seller was ready, able and willing to install the Jaques crushing plant pursuant to the agreement and, indeed, did manufacture the custom-made fabrication steel work, but, in breach of cl 3 thereof, the buyer, although obliged to pay the sum stipulated as a deposit, upon signing the
C agreement, had failed to pay the same or any part thereof, by reason whereof, the seller had terminated the agreement on the ground of breach by the buyer. Thereupon, the seller had sued the buyer for recovery of the sum stipulated in the agreement as a deposit and consequential reliefs.

The primary defence pleaded by the buyer in its statement of defence
D appears in paras 2 and 3 thereof, the material portions of which read as follows:

> 2 ... it was specifically agreed by both parties that no payments would be made on signing the agreement as:
>
> (a) the title for the quarry had not been released to the defendants
E which was to be used as collateral to raise funds to buy the crushing plant;
>
> (b) no quarry licence had been issued to the defendant;
>
> (c) no power supply had been approved for the quarry plant;
>
> (d) no licence had been obtained from the police to store explosives in
F the quarry.
>
> 3 It was further agreed by both parties that payments would only be made after the provisions stated in para 2(a), (b), (c) and (d) herein have been obtained and the plaintiffs were fully aware of and agreed to these.

G It was further pleaded, by para 5 of the statement of defence, that the buyer had never at any time instructed the seller to commence work as the requirements spelt out in para 2(a)–(d) of the statement of defence (quoted above) had not been complied with. There was also the usual omnibus denial save except where there had been express admission.

H At the trial in the High Court at Seremban, the uncontradicted testimony of the seller's general manager, Dennis Khoo Chong Phoe, which the judge had accepted, was as follows (at p 31A, appeal record):

> Shown P1 muka surat 3.
>
> Yes, I asked for 10% deposit RM116,700. No payment made of 10%
I deposit.
>
> Defendant asked for a few days time.
>
> Defendant reminded of the urgency of commencement and asked me to proceed with the contract.

> We proceeded with the contract despite non-payment of 10% of deposit.
>
> My company reminded defendant verbally, asked them since work was in progress.

And later, in cross-examination, the same witness said this (at p 33):

> Defendant told us to commence and sign the agreement and collect the deposit but after signing the agreement he told us to come and collect the cheque for 10% a few days later because they were still negotiating with the bank.

And, still later at p 34A, he said this:

> The equipment stayed in our store and tried to dispose slowly one by one. It is custom-made fabrication steel work still in our stores.

The primary defence aforesaid was put to the seller's general manager, Dennis Khoo Chong Phoe, but he 'disagreed'. Yet, the buyer did not call any evidence in support of its case. The judge was therefore amply justified in accepting the uncontradicted version of the seller as deposed to by its general manager.

In these circumstances, counsel for the buyer in his submission, in the High Court, dwelt on the point that although the seller's claim was for damages for breach of contract no proof of loss had been adduced and the record provided shows that there were repeated references to this point.

However, the trial judge entered judgment for the seller, allowing its claim in full for the recovery of the sum stipulated as a deposit in the agreement and also decreed consequential reliefs, and, from that judgment, the buyer has appealed to this court.

Before us, however, counsel for the buyer's submission appeared somewhat different; he submitted that the initial payment of RM116,700 although expressly stipulated as a deposit by cl 3 of the agreement, was not a true deposit and there being no proof of loss, the judge ought to have dismissed the suit. No objection was taken to this being a new point and so not open to the buyer to take on appeal. Be that as it may, it is clear law that an appellate court is more likely to entertain a new point if it relates to a matter which had been before the court of trial, for example, a new argument based '... upon the construction of a document or upon facts either admitted or proved beyond controversy'. (See *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473 at p 480. Similarly, see *Donaghey v O'Brien & Co* [1966] 2 All ER 822 at pp 828, 831; [1966] 1 WLR 1170 at pp 1180, 1183.)

Assuming, therefore, that counsel for the buyer's submission is a new point, we propose to consider it.

In considering the question whether what was expressly stipulated as a deposit in the agreement was a true deposit, we have paid due regard to the terms of the agreement as a whole, and the surrounding circumstances.

To begin with, we have taken into consideration the label attached by the parties to the initial payment as it appears in cl 3 of the agreement, namely, the word 'deposit'. It has been said that in determining whether

money has been paid by way of deposit or by way of part payment, considerable weight is to be given to the label attached by the parties to the payment. (See *Howe v Smith* (1884) 27 Ch D 89 and also the Singapore Privy Council case of *Mayson v Clouet* [1924] AC 980). Especially is this so in a case such as this where the agreement had been entered into by two incorporated companies, engaged in trade, both commercially autonomous, fully informed of all the relevant facts, with free access to legal advice, and having regard to the degree of formality in the wording of the agreement.

The next point to note regarding this part of the case is, of course, the reasonableness of the amount stipulated as a deposit in cl 3 of the agreement. It has often been said, and we agree, that a sum within the range of 10% of the purchase price would be considered reasonable. This approach has the backing of long continued usage and also authority and we unhesitatingly adopt it. (See *Song Toh Chu v Chan Kiat Neo* [1973] 2 MLJ 206 at p 207.) The reasonableness of the sum stipulated as a deposit in a contract is one of the most significant factors in determining whether or not the sum stipulated is a true deposit. (See, eg *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89.)

Yet another point to note in this context, is that the agreement distinguishes between the initial payment of RM116,700 expressly stipulated as a deposit and the four subsequent payments, which were clearly instalment payments, hereinbefore referred to.

We would add, lest we be accused of an oversight, that we do not consider that either cl 4 or cl 7 assists the buyer in establishing that the initial payment, expressly stipulated as a deposit under cl 3 of the agreement, was in truth purely an instalment payment towards the purchase price, and so, in the absence of express provision, not liable to be treated as forfeited even though the sale goes off through the purchaser's default. (See *Mayson v Clouet* [1924] AC 980; *Harrison v Holland* [1922] 1 KB 211.)

So far as cl 4 is concerned, this bears the sub-heading 'Basis of delivery', and consists of three limbs, all relating to matters of delivery or testing, none of which helps in ascertaining whether the payment concerned is a true deposit. The same can be said as regards cl 11, which bears the sub-heading 'Delays', the object of which is to enable the supplier (ie the seller) to obtain an extension of time to make delivery, where this has been delayed due to causes beyond its control.

In our view, the only clause of direct relevance to the issue at hand is cl 3 which expressly provides for an initial payment of the sum of RM116,700 by way of 'deposit to be paid on signing of the contract'. For the purposes of construction of contracts, the intention of the parties is the meaning of the words they have used. In *Schuler (L) AG v Wickman Machine Tool Sales Ltd* [1974] AC 235; [1973] 2 All ER 39; [1973] 2 WLR 683 , Lord Simon of Glaisdale approved the following passage in *Norton on Deeds* (2nd Ed) at p 50:

> ... the question to be answered always is, 'What is the meaning of what the parties have said?' not 'What did the parties mean to say?' ... it being a

presumption juris et de jure ... that the parties intended to say that which they have said. A

Turning to the surrounding circumstances, we have not overlooked the point that, although the seller had not received the deposit, it had proceeded to implement the agreement for supply and installation of the crushing plant but, it will be recalled, at the urgent behest of the buyer, which had promised payment of the deposit, in a few days' time after execution of the agreement, as it was negotiating with its banker for finance. (See the uncontradicted testimony of the seller's general manager, Dennis Khoo Chong Phoe, quoted above, which the trial judge had accepted.) In this context, the question arises whether the sum of RM116,700 stipulated as a deposit under the agreement was a true deposit or purely an instalment payment towards the purchase price. If the latter, as we have observed, in the absence of express provision, it is not liable to be treated as forfeited, even though the sale goes off through the purchaser's default. (See *Mayson v Clouet*; *Harrison v Holland.*) B C

In our view, the fact that the parties might subsequently have agreed that the initial payment stipulated as a deposit in the agreement might be paid later, ie subsequent to the agreement, does not mean that the payment loses its character of a deposit. We are supported in this by *Chard v Willett* [1933] QSR 182, where the purchaser instead of paying the agreed deposit, in cash, on the date of the sale, paid it by instalments subsequent to the contract; the subsequent payments did not lose their character of a deposit merely by reason of their being paid at later dates. It follows, that a deposit need not be paid on signing of the contract. D E

Applying the principle enunciated in *Chard v Willett*, the fact that the seller here had, subsequent to the agreement, agreed to accept late payment of the deposit does not mean that the promised initial payment lost its character of a deposit. F

For the reasons adumbrated above, we are amply satisfied that the initial payment expressly stipulated as a deposit in cl 3 of the agreement was a true deposit. It follows, that s 74(1) and (2) of the Contracts Act 1950, which reads: G

(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. H

(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

does not apply and, so, the seller need not prove his damage.

Having concluded that the initial payment of RM116,700 stipulated as a deposit under the agreement was indeed a true deposit, the principal question of law for decision in this appeal is whether the seller who had rightly terminated the agreement on account of the buyer's breach is I

A entitled to recover the unpaid deposit, which under the agreement the buyer was obliged to, but did not pay.

A review of the authorities in the United Kingdom, Australia and New Zealand shows that the principal question raised by this appeal has not been finally resolved.

B In the United Kingdom, the oft-cited authorities which were decided in favour of the vendor, are *Hinton v Sparkes* (1867–68) 3 LRCP 161, *Dewar v Mintoft* [1912] 2 KB 373 and *Damon Compania Naviera SA v Hapag-Lloyd International SA* [1985] 1 All ER 475; [1985] 1 WLR 435. For the opposite view, the authority usually cited is *Lowe v Hope* [1970] C Ch 94; [1969] 3 All ER 605; [1969] 3 WLR 582.

In *Hinton v Sparkes*, Willes J, speaking for the Court of Common Pleas, decided that the vendor was entitled to recover the unpaid deposit from the purchaser and his reasoning for this conclusion appears sufficiently from the following passage in his judgment:

D > The only other question is, whether the vendor is to be in any worse position because the deposit was not paid down at the time. I cannot see why the rights of the vendor should be affected by the purchaser's having committed two breaches of contract instead of one ... If the money had been paid, the purchaser clearly could not have recovered it back.

E So, also, in *Dewar v Mintoft*, the contract provided, inter alia, that if the purchaser shall neglect or fail to comply with any of its conditions, his deposit shall be forfeited to the vendor. Horridge J answered the question whether the vendor was entitled to recover the unpaid deposit in favour of the vendor, his reasoning being:

F > ... the defendant could not put himself in a better position by refusing to pay the deposit than if the deposit had in fact been paid, in which case it could be retained by the seller ...

However, in *Lowe v Hope*, the vendor had by his statement of claim sought rescission of the contract and recovery of the unpaid deposit. G Pennycuick J considered that *Dewar v Mintoft* was wrongly decided and concluded that the vendor could not recover the deposit under a contract which he had rescinded. His Lordship reasoned as follows:

> It seems to me that the vendor having elected to bring the contract to an end by rescission is not entitled to insist on the performance of the contract in relation to the deposit. This is admittedly so, in so far as the deposit bears H the character of part of the unpaid purchase price. It seems to me that it must equally be so, in so far as the deposit bears the character of a pledge; for once the vendor has rescinded the contract there are no outstanding obligations of the purchaser in respect of which the vendor can be entitled to be protected by a pledge.

I In *Damon SA v Hapag-Lloyd SA*, one of the questions raised was whether vendors of three ships were entitled to recover the amount of an unpaid deposit as a debt or, in the alternative, as damages for breach of an obligation to pay it.

The Court of Appeal, by majority (Stephenson and Fox LJJ, Robert Goff LJ dissenting) held, after a thorough review of the cases, that the vendor was entitled to recover the unpaid deposit. Fox LJ observed ([1985] 1 All ER 475 at p 488E–G; [1985] 1 WLR 435 at p 451F–H):

> Mr Moore-Bick contends that *Dewar v Mintoft* is to be preferred to *Lowe v Hope* because rescission by the injured party only releases the party in breach from future obligations. I think that is right. In deciding *Lowe v Hope*, Pennycuick J did not have the advantage of the decision in *Johnson v Agnew* [1980] AC 367 and the clarification of the law which it contained. Pennycuick J remarked that it was admittedly the case that if the vendor has accepted the purchaser's repudiation, there can thereafter be no recovery in respect of money bearing simply the character of purchase price. That is correct but it is dealing with a different problem. A purchase price is payable in return for a conveyance and if the obligation to convey has gone because of the acceptance of the repudiation there is no longer a purchase and sale to which a purchase price can be related. The right of the vendor to forfeit the deposit is not, however, dependent upon completion of the purchase. The right to forfeit arises out of the breach and is, therefore, something quite different from the right to receive the purchase money in return for a conveyance.
>
> The result, in my view, is that *Dewar v Mintoft* was rightly decided ...

He added ([1985] 1 All ER 475 at p 488H; [1985] 1 WLR 435 at p 452B):

> It seems to me therefore that Hapag-Lloyd was at the time when they accepted the repudiation already entitled to a vested right to sue Damon for damages for breach of its obligation to sign the memorandum and that the measure of damages is the amount of the deposit.

We next turn to consider the Australian cases.

In *Farrant v Leburn* [1970] WAR 179, a decision of the Supreme Court of Western Australia, Wickham J refused to follow *Lowe v Hope*.

His Lordship noted that in *Lowe v Hope*, Pennycuick J had relied in part on a description of the effect of rescission appearing in *Williams on Vendor and Purchaser* (4th Ed) at p 1007, which his Lordship considered to be a little misleading having regard to the doctrine which had been distilled in Australia, mainly from the dicta of Dixon J (as he then was) in *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476 et seq which reads as follows:

> The general rule however that in an executory contract for the sale of land the vendor cannot sue for the price is excluded whenever a contrary intention is shown by the express terms of the contract. And it seems established by authority that a contrary intention is sufficiently shown in all cases in which by the express terms of the contract the purchase money or any part thereof is made payable on a fixed day, not being the agreed day for completion of the contract by conveyance. In all such cases the purchase money or such part thereof becomes, on the day so fixed for its payment a debt immediately recoverable by the vendor irrespective of the question whether a conveyance has been executed and notwithstanding the fact that the purchaser may have repudiated his contract.

Wickham J was also of the view that the decision of Pennycuick J in *Lowe v Hope* might have been due to his having failed to recognize the distinction between rescission 'ab initio' and rescission 'de futuro' or discharge for breach. Prior to the House of Lords decision in *Johnson v Agnew* [1979] 1 All ER 883; [1979] 2 WLR 487, the courts in the United Kingdom had frequently held that every rescission was a rescission 'ab initio' with much resulting confusion.

We need hardly say that when a contract is rescinded 'ab initio' any reliance on a cause of action — including one for the recovery of an unpaid deposit payable under a contract — based on the existence of the contract, would be misplaced.

In the words of Lord Wilberforce in *Johnson v Agnew* [1980] AC 367 at pp 392–393; [1979] 1 All ER 883 at p 889F–G; [1979] 2 WLR 487 at p 492B–C:

> At this point it is important to dissipate a fertile source of confusion and to make clear that although the vendor is sometimes referred to in the above situation as 'rescinding' the contract, this so-called 'rescission' is quite different from rescission ab initio, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence. (Cases of a contractual right to rescind may fall under this principle but are not relevant to the present discussion.) In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about 'rescission ab initio'.

To return to *Farrant v Leburn*, Wickham J considered that the answer to the question posed 'turned upon whether the amount was unconditionally due and payable prior to rescission of the contract (in the sense of the plaintiff treating it as discharged) and whether the consideration supporting the promise had then been executed' (at p 183).

And, further down, Wickham J said that payment of a deposit is in no way conditional upon completion and becomes the absolute property of the seller if received. The reason for this has been said to be found in the nature of a deposit as a guarantee.

And, then, directing his attention once again to the question posed, he said this:

> Here the purchaser made an unconditional promise to pay a deposit immediately and, although if the contract was completed the moneys would according to ordinary principles be credited towards the purchase price and until then would constitute an earnest for performance, the agreement to pay was not in consideration of conveyance but was in consideration of the contract. It was the price or part of the price of the vendor's promise to sell and this promise, having been given by the vendor the consideration for the purchaser's promise was fully executed. There is then no question of rescission having caused the consideration to fail. The plaintiff's right to the balance of the deposit in this case was not only vested prior to rescission but it was vested upon an executed consideration ...

But, in *Lyon v Magnet Nominees Pty Ltd* [1978] VR 673, Harris J speaking for the Supreme Court of Victoria, said this (at p 676): A

> Counsel for the defendant relied upon what was said by Dixon J [as he then was] in *McDonald v Dennys Lascelles* (1933) 48 CLR 457 at pp 476–478. What his Honour did in that passage was to point out that, when a contract is dissolved at the election of the party because the other has not observed B an essential condition, or has committed a breach going to its root, the contract is determined so far as it is executory only and that the party in default was liable for damages. However, he went on to hold that, under an instalment contract for the sale of land, a vendor who rescinds in such a way, is not entitled to sue for any unpaid instalments of purchase money. Far from supporting the defendant's case, in my opinion, the statement of C the law by Dixon J is against the defendant, although it deals with instalments of purchase money and not the deposit. If instalments of purchase money are not recoverable by a vendor, then the deposit, or an unpaid part of the deposit, could only be recovered if it could be said that the vendor could do this in order to enable him to forfeit this sum when received. In my opinion, the reasoning in *Lowe v Hope* [1970] Ch 94, rightly precludes this being D done.

Nevertheless, three years later, in *Bot v Ristevski* [1981] VR 120, Brooking J sitting in the Supreme Court of Victoria, held that when a vendor had terminated a contract by accepting the purchaser's repudiation, he would be entitled to recover an unpaid deposit on the ground that in such a E situation there will have been no failure of consideration since the consideration for the deposit was not the conveyance but the entering into the contract. The following passage in the judgment of his Lordship merits careful reading:

> The question is whether the plaintiffs have lost this right by electing to F discharge the contract in reliance upon the defendant's repudiation. It is clear that the determination of a contract by the acceptance of a repudiation does not in general affect rights which have already been acquired by reason of the contract. The contrary view, based on the confusion between rescission for extrinsic collateral cause, like fraud, and discharge for breach, was G rejected by the Supreme Court of South Australia in 1928 (*Ettridge v Vermin Board of District of Murat Bay* [1928] SASR 124; *McLachlan v Nourse* (1928) SASR 230 at pp 233–234) and was finally disposed of in this country five years later by the judgment of Sir Owen Dixon in *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at pp 476–477. I prefer to approach the problem by asking whether an unconditional right to recover and retain H deposit arose before the contract was discharged. If such a right did arise, it will survive the determination of the contract, and if the money has been paid before discharge the purchaser will not get it back, while if the money has not been paid or discharged the purchaser will be compelled to pay it. Whether the vendor obtained an unconditional right to recover and retain the deposit will depend upon whether the discharge of the contract will give I rise to total failure of consideration for the payment of the deposit. If it will, then the consequences of discharge will be that the vendor cannot recover the deposit, if unpaid or retain it if paid. Either there was an unconditional right to recover and retain the deposit or there was not.

In New Zealand, in *Johnson v Jones* [1972] NZLR 313, the Supreme Court of New Zealand expressed a preference for *Lowe v Hope* [1970] Ch 94; [1969] 3 All ER 605; [1969] 3 WLR 582 over *Dewar v Mintoft* [1912] 2 KB 373, the soundness of which, it doubted.

Turning to the text book writers, Prof Visu Sinnadurai (now a High Court judge) has pointed out at p 375 of his book on *Sale and Purchase of Real Property in Malaysia* that there is more authority in support of the view that the vendor, on rescinding the contract, may recover any unpaid deposit. Professor Visu Sinnadurai then refers (at p 376) to the observations of Brooking J in *Bot v Ristevski* expressing doubts as to whether the reasoning of Pennycuick J in *Lowe v Hope* would still be considered valid since the decision of the House of Lords in *Johnson v Agnew* [1980] AC 367; [1979] 1 All ER 883; [1979] 2 WLR 487 and, on the same page, adds:

> It is clear that in *Lowe v Hope* Pennycuick J was influenced by the notion that upon rescission the contract becomes void ab initio so that the only remedy was restitutio in integrum. His Lordship therefore held that as the contract had come to an end, all existing and future obligations also came to an end. This theory has now been dispelled by the House of Lords. It is clear now that on rescission only future obligations come to an end. As the right to the payment of the deposit had accrued to the vendor prior to the rescission he should be able to recover it.

Mr JB Carter in his book on *Breach of Contract* (2nd Ed), referring to the question whether unpaid deposits provided as being payable under a contract are recoverable says this (at p 480 para 1254):

> Although the matter must still be regarded as unsettled, it is suggested that the authorities favouring recovery of a deposit should be followed. A purchaser's obligation to pay a deposit is sufficiently independent of performance by the vendor to justify the view that the parties must intend unpaid deposits to be recoverable by a vendor, even after termination, on the basis of an accrued right to receive performance of the obligation to pay.

Trietel in his book, *The Law of Contract* (6th Ed), Chitty in his book, *Chitty on Contracts* (25th Ed, Vol 1) at para 1971, Goff and Jones in their book, *The Law of Restitution* (2nd Ed) at p 380 and *McGregor on Damages* (14th Ed) at para 388, all favour the view expressed in *Dewar v Mintoft* and derive support for it from *Hinton v Sparkes* (1867–68) 3 LRCP 161.

We consider that the authorities which support the proposition for recovery of an unpaid deposit are to be preferred to those to the opposite effect. Our reason for this conclusion is that the effect in law of the contractual obligation to pay a deposit is to vest an indubitable right in the vendor to receive the deposit upon the contract coming into existence notwithstanding subsequent termination. This is entirely in accord with the purpose of a deposit which according to Lord Macnaghten in *Soper v Arnold* (1889) 14 App Cas 429 at p 435 is this:

> The deposit serves two purposes — if the purchase is carried out it goes against the purchase-money — but its primary purpose is this, it is a guarantee that the purchaser means business ...

And, in the same case, Lord Herschell said (at p 433): 'The deposit is given as a security for the performance of the contract.' A

When, therefore, a deposit is forfeited it represents damages for a vendor for the loss of his bargain. We can therefore see no distinction in principle why a vendor should not be entitled to sue for recovery of an unpaid deposit upon termination for breach, regard being had to the purpose of a deposit as explained above. In such a situation, the rights and obligations of the parties so far as the future is concerned are discharged but those previously vested or incurred, as the case may be, remain untouched. B

The five remaining questions in this appeal may be shortly dealt with and may be stated thus: C

First, before us, it was argued for the buyer that the seller had not, in its statement of claim, prayed, in so many words, for recovery of the deposit but instead had prayed 'for damages for repudiation amounting to RM116,700, being 10% of the contract price'. We agree that the prayer was inartistically worded but reading the statement of claim as a whole, and considering the substance and effect thereof, it is perfectly clear that what the seller was seeking was recovery of the unpaid deposit payable under the agreement by the buyer. Indeed, in the course of his submission in the High Court, counsel for the seller emphasized: 'This case is in respect of deposit and not a claim for damages. Actual loss need not be proved'. There can also be no doubt that counsel for the buyer knew perfectly well what the case for the seller was and that at no time was he taken by surprise by the stance adopted by counsel for the seller. D E

Secondly, the right to recover an unpaid deposit or to forfeit a deposit which has been paid, puts the vendor in the position of being able to obtain compensation without having to prove his damage and so there is no duty on his part to mitigate. F

Therefore, the fact that a vendor might resell at a profit does not preclude him from exercising his right of forfeiture (see *Coates v Sarich* [1964] WAR 2), or, we would add, his right of recovery of an unpaid deposit. Indeed, in *Damon Compania Naveria SA v Hapag-Lloyd International SA* [1985] 1 All ER 475; [1985] 1 WLR 435, the English Court of Appeal had ordered recovery of the full deposit although the actual damage suffered by the vendor had been less than the deposit. G

Moreover, a vendor forfeiting a deposit may recover damages for losses occasioned by a purchaser's breach, beyond the sum forfeited but must give credit for the amount of deposit paid before he makes such a claim (per Fry J in *Howe v Smith* (1884) 27 Ch D 89 at p 105 applied in *Shuttleworth v Clews* [1910] 1 Ch 176). H

Thirdly, we recognize that the agreement in this case did not provide for forfeiture of the deposit in the event of breach by the buyer. Does this fact preclude the seller from recovering the unpaid deposit? We think not. I

In the Australian case of *Coates v Sarich*, Hale J said, and we agree, that:

A The deposit is met with in its simplest form where on the signing of a contract the purchaser makes an immediate payment of a comparatively small proportion of the price, the balance being payable in exchange for the conveyance: if nothing else is said in the contract it is necessary to imply a term as to what is to happen to the deposit: *Howe v Smith* (1884) 27 Ch D 89, was such a case; and the implication to be made is that if the purchase B is carried through the deposit is to go against the price, but that if the contract goes off by the purchaser's default the deposit is to be forfeited to the vendor. But this implication will not be made if the contract contains an express and inconsistent provision: *Palmer v Temple* (1839) 9 Ad & El 508; 112 ER 1304.

C In the English case of *Howe v Smith*, Fry LJ explaining the function of a deposit said, and we agree, that:

Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract D to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract.

E We can see no distinction in principle why the observations of Hale J and Fry LJ should not apply to a claim by a vendor for recovery of an unpaid deposit.

Fourthly, we have also considered the question of relief against forfeiture of deposits by virtue of s 75 of the Contracts Act 1950, which reads:

F

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable G compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

In this context, we consider the law to have been correctly summarized by Prof Visu Sinnadurai in his book, *Sale and Purchase of Real Property* at pp 368 and 369 as follows:

H

What then is the state of the present law regarding relief against forfeiture of deposits under s 75 of the Contracts Act? It is submitted that the legal position may be summarized as follows:

(a) any reasonable sum of money paid as a deposit which is meant to be earnest money is irrecoverable by the purchaser on a breach committed I by him. No relief against forfeiture under s 75 will be granted. As the Privy Council said in *Linggi Plantations*:

'... once it is decided that the construction of the contract is such that the sum of RM377,500 was paid as a true deposit, that is, on

the same terms as the deposit in *Howe v Smith*, and was thus to be liable to forfeiture under the contract, in case of failure by the purchaser to complete, s 75 of the Contracts (Malay States) Ordinance can have no application when the contract is properly terminated and the deposit is forfeited whether or not damage is proved.'

(b) any sum which has already been paid, other than as earnest money, before a breach, and even though referred to as a 'deposit' under the contract and which is subject to forfeiture under the terms of the contract is not liable to be forfeited per se. Section 75 may be invoked and a reasonable compensation awarded according to the damage suffered by the vendor as a result of the breach.

The following cases illustrate the second proposition spelt out above. In the early Privy Council decision of *Bhai Panna Singh v Bhai Arjun Singh* AIR 1929 PC 179, the sale and purchase agreement provided the sale price to be Rs105,000. The purchasers were to pay Rs500 earnest money. It was further provided that:

'The party retracting from the contract shall pay Rs10,000 as (damages).'

The issue before the Privy Council was whether the purchasers having broken the contract, the vendor could forfeit the Rs500 and also claim the Rs10,000. The Privy Council held that as the Rs500 was paid as earnest money, it was irrecoverable. As to the Rs10,000 the vendors could only recover reasonable compensation under s 75 (74 of the Indian Act).

It follows that having found that the sum for which recovery was sought was a genuine deposit and the amount thereof reasonable, no question of relief against forfeiture under s 75 of the Contracts Act 1950 can arise.

However, we must point out, for the sake of completeness, that in *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89 at p 94, Lord Hailsham referring to what Cotton LJ said in *Howe v Smith* (1884) 27 Ch D 89 at p 95, remarked, in passing, that 'there may be cases when equity would relieve a purchaser who has paid a deposit, and then defaulted although it is to be said that the last word is probably not yet spoken on this subject'. Lord Hailsham then cited *Stockloser v Johnson* [1954] 1 QB 476; [1954] 1 All ER 630; [1954] 2 WLR 439 wherein conflicting views were expressed by the judges who comprised the Court of Appeal (Romer, Somervell and Denning LJJ) on the question whether equity could intervene to grant more general relief, and not just relief by way of an extension of time for payment. However, we do not propose to resolve this conflict as it does not arise for determination in the present appeal.

The result, therefore, is that this appeal is dismissed with costs, the judgment of the court below is affirmed, and we direct that the sum deposited in court by way of security for the costs of this appeal, be paid out to the seller, to account of its taxed costs.

Mohamed Azmi FCJ (dissenting): The plaintiff's case as pleaded, is a straightforward claim for general and special damages for accepted repudiatory breach of a sale and purchase agreement dated 13 September 1984 in respect of a complete set of quarry crushing plant at a price of RM1,167,000 which, under the terms of the contract, was payable in five instalments, but the central issue considered relevant by the learned trial judge and the reasoning given in his grounds of decision for entering judgment for the plaintiff in the sum of RM116,700, as damages for repudiation 'as prayed', had left a trail of confusion, so much so that after hearing arguments, this court needed time to consider its judgment.

There are nine simple paragraphs in the plaintiff's statement of claim. The relevant allegations in the pleading read as follows:

> 3 By cl 3 of the said agreement the defendant covenanted to pay the plaintiff the sum of RM116,700 as deposit being 10% of the contract sum on signing of the contract.
>
> 4 Pursuant to the said agreement the plaintiff duly prepared to instal the said crushing plant at the defendant's site in Pedas, Negeri Sembilan by the purchase and supply of goods necessary for the due performance of the contract.
>
> ...
>
> 6 In breach of cl 3, the defendant failed to pay the sum of RM116,700 and by their conduct repudiated the said agreement and refused any longer to be bound thereby.
>
> ...
>
> 9 By reason of the matters aforesaid the plaintiff has lost the benefit of the said agreement and lost profit they would otherwise have received thereunder and have suffered loss and damage.
>
> Particulars
>
> (1) Finance and storage charges for the said equipment for nine months from January to November 1985 at RM10,000 per month ... RM90,000
>
> And the plaintiff claims:
>
> (a) the said sum of RM90,000;
>
> (b) damages for repudiation of the said agreement amounting to RM116,700 being 10% of the contract price;
>
> (c) interest on the amount found to be due to the plaintiff at such rate and for such period as may seem fit and proper pursuant to s 11 of the Civil Law Act 1956;
>
> (d) costs; [and]
>
> (e) further or other relief.

It should be noted at this early stage that the claim of RM90,000 as special damages was abandoned by the plaintiff at the hearing below, leaving only the claim of RM116,700 as general damages for determination. The learned judge found the defendant liable for repudiating the contract, and in allowing the plaintiff's claim, the loss or damage allegedly suffered by

them were in effect assessed purely on the basis of 10% of the contract price without proof of loss or damage under s 74 of the Contracts Act 1950 ['the Contracts Act'] which provides:

> (1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> (2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.
>
> (3) When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default as if the person had contracted to discharge it and had broken his contract.

The agreement in this case does not contain the type of deposit clause that is normally found in cases involving a claim for paid or unpaid deposit, but the requirement of first down payment of RM116,700 on the execution of the contract under the 'terms of payment' is expressed in cl 3 of the sale and purchase agreement in the following terms:

> Terms of payment
>
> | | | |
> |---|---|---|
> | RM116,700 | — | Deposit to be paid on signing of this contract. |
> | RM408,450 | — | On delivery of prime equipment, ie all crushers and screens in this project. |
> | RM408,450 | — | On delivery of the essential steel structures for crushers and screens support, chuteworks, conveyor frames and ancillaries. |
> | RM175,050 | — | On completion of erection and ready to test and commissioning. |
> | RM58,350 | — | 30 days after commissioning and acceptance of the plant. |
> | RM1,167,000 | | |

The distinction between a claim in damages for repudiation of contract (as pleaded in this case) and a claim for paid or unpaid deposit, does not fall within the realm of mere technicalities. One of the major differences is that unlike the former, a claim on deposit is based firstly on whether the amount claimed was unconditionally due and payable prior to the acceptance by the plaintiff of defendant's repudiation, and secondly, on whether the consideration supporting the promise had then been executed. In *Farrant v Leburn* [1970] WAR 179 at p 183, Wickham J said:

> The question here is whether the promise to pay by the purchaser has given rise to an unconditional debt as distinct from a claim for unliquidated damages for breach of an executory contract.

It would therefore appear that apart from the requirement of the deposit having double purpose in the nature of a true deposit, there must be an unconditional promise by the purchaser to pay the deposit immediately because the agreement to pay was not in consideration of the goods sold or of the conveyance, but was in consideration of the contract. Thus, where the promise to pay immediately on signing of the contract is conditional, a claim on unpaid deposit must necessarily fail.

Although under cl 12(d) time was made the essence of the contract, there is no dispute that on signing of the agreement in September 1984, no payment under cl 3 was made thereby entitling the plaintiff to rescind the contract and claim for damages, but they elected to proceed with it without any immediate payment. The plaintiff would appear to be in a hurry to clinch the deal, and had apparently agreed to waive or postpone the payment on signing of the agreement. This is also reflected in the defendant's solicitor's letter dated 10 January 1986 which is now reproduced:

> Daim & Gamany
> Peguambela dan peguamcara
> (Advocates and solicitors)
> No 3, 1st floor
> Jalan Tun Perak
> 50050 Kuala Lumpur
> Malaysia
> Tel: 2984932
>
> Surat kami: Gen/85/Morello
> Surat tuan: KC/2803
> 10 January 1986.
>
> M/s KC Chai & Co,
> Advocates & Solicitors,
> 401, 6th mile,
> Klang Road,
> Petaling,
> 58000 Kuala Lumpur.
>
> Dear Sirs
>
> Re: Contract for the supply of one 100 TPH Jaques crushing plant at Pedas, Negeri Sembilan for M/s Morello Sdn Bhd
>
> We refer to your letter of 17 December 1985 for which we have our client's instructions.
>
> We have been informed by our clients that your clients M/s Jaques (International) Sdn Bhd were aware that on signing the agreement the deposit was not to be paid. Your clients were also aware that at the time in question the application for the quarry was yet to be approved and till date our clients have not been issued with any title for the land in question. It was your clients who insisted to execute the agreement pending the approval of the application, and our clients obliged to execute the agreement with the consent of your clients that no payment is to be made.

As such, our clients are not liable to pay this amount and in the event that your clients intend to repudiate the contract, our clients have no objection.

In the event that your clients wish to pursue this matter you could effect service on us.

Yours faithfully
— Sgd —
cc: clients
DG/sn

If the claim had been for payment of unpaid deposit, one would have thought that the issue of whether there was waiver or a postponement of the payment or whether the promise to pay immediately was subsequently made conditional, and also the issue of whether the word 'deposit' in cl 3 is a true deposit, would by necessity become exceedingly relevant for determination in respect of the defendant's liability. Unfortunately, none of these issues were argued and considered or sufficiently argued and considered in the court below. On this ground alone, I am of the view that the plaintiff's claim cannot be founded on unpaid deposit, but must remain as pleaded as a claim in damages for repudiation of the contract.

There can be no doubt that the other crucial issue in this case is whether under cl 3 of the agreement, the first payment of RM116,700 could be construed as mere payment of the first instalment or as a 'true deposit' which in the words of Lord Hailsham LC in the Privy Council case of *Linggi Plantations Ltd v Jagatheesan* [1972] 1 MLJ 89, should be a deposit 'on the same terms as the deposit in *Howe v Smith* (1884) 27 Ch D 89, and was thus to be liable to forfeiture under the contract, in the case of failure by the purchaser to complete'. Unless this vital issue is resolved by the learned trial judge, I am of the opinion that any discussion on the entitlement of the plaintiff to recover an unpaid deposit would be an exercise in futility. Putting the cart before the horse would not assist the plaintiff's cause one bit.

It is clear from the judgment of the Privy Council that there is no difference in this context between that expression 'deposit' and the expression 'earnest money'. They are two words of the same meaning. Thus, in my view, to be a 'true deposit' the sum paid or agreed to be paid as 'deposit' must contain the element of earnest money as a consideration for the mini contract within the main contract of the sale and purchase agreement, in order to persuade the purchaser to complete the purchase, which according to Fry J in *Howe v Smith* (1884) Ch D 27 at p 101 'by fear of forfeiture ...'. In short, a true 'deposit' is a guarantee that the contract shall be performed in addition to being part payment towards the purchase price if the contract is performed.

It is interesting to note that in *Howe v Smith*, the relevant agreement expressly provided the sum of £500 'as a deposit and in part payment of the purchase price'. In short the dual purpose of the money labelled as a 'deposit', must be expressed or could clearly be inferred from the four corners of the contract. Both in *Linggi Plantations*, as well as *Howe v Smith*,

the intention of the parties to provide the dual purpose of the 'deposit' could be established without much effort although the subject matter of the contract was the sale and purchase of real property. Thus in *Linggi Plantations*, the dual purpose of the 'deposit' was expressed in these terms:

> 1 Subject always to cl 2 hereof the vendor shall sell and the purchaser shall purchase the said lands excluding the areas sold upon and subject to the terms and conditions and to the rights hereinafter set forth free from encumbrances and with vacant possession at the price of dollars three million seven hundred and seventy five thousand (RM3,775,000) whereof the vendor's agents Guthrie Agency (Malaya) Ltd of 4 Mountbatten Road, Kuala Lumpur have prior to the execution of these presents received the sum of dollars three hundred and seventy seven thousand five hundred (RM377,500) by way of deposit and part payment.
>
> 5 If due to any act or default of the purchaser the said purchase shall not be completed as herein provided the vendor shall be entitled by notice in writing to the purchaser to declare this agreement at an end and thereupon this agreement shall cease to be of any force or effect and the sum of RM377,500 (dollars three hundred and seventy seven thousand five hundred) referred to in cl 1 hereby shall be forfeited to the vendor to account of damages for breach of contract.

Similarly in *Damon Compania Naviera SA v Hapag-Lloyd International SA* [1985] 1 All ER 475; [1985] 1 WLR 435, an authority relied upon by the learned judge, in a contract to purchase three second-hand ships at a price of US$2,365,000, the dual purpose of the deposit was made clear by cll 3 and 13 of the memorandum of agreement which provided:

> 2 As a security for the correct fulfilment of this contract, the buyers shall pay a deposit of 10% ... of the purchase money on signing this contract. This amount shall be deposited with Bremer Bank ... and held by them in a joint account for the sellers and the buyers ...
>
> 13 Should the purchase money not be paid as per cl 16 (which provided for payment of specified sums on the delivery of each ship) the sellers have the right to cancel this contract, in which case the amount deposited shall be forfeited to the sellers. If the deposit does not cover the seller's loss, they shall be entitled to claim further compensation for any loss and for all expenses together with interest at the rate of 5%pa.

In the instant case, however, apart from the solitary word 'deposit' in cl 3, the agreement does not indicate either expressly or by necessary implication that it is also a guarantee or earnest money for performance. Reading from the four corners of the agreement there is only one single purpose, namely, the deposit is merely a down payment towards the purchase price to be paid when the contract was signed. This is confirmed when the parties subsequently waived the promise to pay immediately and postponed all payments until the defendant were issued with the land title as stated in defendant's solicitor's letter. In my opinion, the promise to pay immediately has been waived, and as such the agreement to pay RM116,700 was not in consideration of the contract but was solely in consideration of the quarry plant. At the very minimum, the defendant's promise to pay was conditional.

In the circumstances, the word 'deposit' in cl 3 could not in all probabilities be intended as a true deposit. A

From the appeal record, I cannot find any reply to the defendant's solicitor's letter of 10 January 1986, either tendered in court or included in the agreed bundle of documents. I must therefore assume that the plaintiff did not send any reply to deny the allegations made, and as such it is reasonable to conclude that when the contract was signed, they probably must have waived the agreement to pay immediately and postponed the payment until the defendant had been issued with the necessary land title for purpose of charging it as security to the bank, to finance the quarry project. Even if there had been a reply, the matter ought to be given due consideration by the court. B C

Written documents speak louder than words. The failure of the learned judge to consider the contemporaneous documentary evidence in conjunction with para 2 of the statement of defence has, in my view, occasioned a failure of justice, particularly so when the learned judge made unwarranted adverse criticism against the defendant for their decision not to adduce oral evidence. In the circumstances of this case, I think the defendant were legally entitled to rely purely on the pleadings and the documentary evidence to show that the agreement to pay RM116,700 'on signing of the agreement' has been waived or postponed or made conditional by the parties. There is therefore no proper basis to treat the plaintiff's claim as pleaded as a claim for payment of unpaid deposit D E

The sum prayed for in the statement of claim has been expressly pleaded as 'damages for repudiation' of the agreement and not as damages for recovery of unpaid deposit. If at all the plaintiff have suffered loss or damage as a result of any breach as provided in paras 6 and 9 of the plaintiff's pleading, then even if liability be proved, it is their duty to lead evidence for proof of such damage or loss under s 74 of the Contracts Act. At this appellate stage, I do not think this court should be persuaded to read the sum of RM116,700 (though amounting to only 10% of the contract price) as agreed liquidated general damages or as a claim for recovery of unpaid deposit. Nor can the plaintiff as a matter of convenience to themselves ask the court to treat the sum labelled as a deposit, as a means of assessing general damages without proof. F G

The law on the importance of pleadings is well established and can be found in *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 and *Lee Ah Chor v Southern Bank Bhd* [1991] 1 MLJ 428, where the Supreme Court quoted with approval the following statement of Lord Diplock in *Hadmor Productions v Hamilton* [1983] 1 AC 191 at p 233; [1982] 1 All ER 1042 at p 1056; [1982] 2 WLR 322 at p 337: H

> Under our adversary system of procedure, for a judge to disregard the rule by which counsels are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is ... I

In my view, both the learned judge and the counsel for the plaintiff would appear to ignore the important distinction between a claim for damages for breach of contract and a claim for recovery of unpaid deposit. They appear to have treated the two distinct causes of action as interchangeable. Though not required by the pleading in the statement of claim, the judge painstakingly dealt with the correct law on forfeitable deposit, ie deposit already paid, at pp 6–11 in his grounds of decision without, however, finding it necessary to apply the law to the facts of the case before him, when he omitted to investigate and come to any conclusion whether the deposit in cl 3 is a true deposit. It should be noted that both here and in the court below, the plaintiff elected not to apply for amendment of their pleading. The learned judge also did not consider it necessary. Indeed going by the appeal record there is no reason to do so, because at the conclusion of the hearing and after submissions were made, the learned judge requested for further written submissions on the subject of mitigation of damages which only went to show that the learned judge, with the knowledge and consent of both counsel, was treating the claim on a basis of general damages for repudiation of the agreement, as prayed for in the pleadings and not on the basis of unpaid deposit. As stated earlier, the learned judge did indeed enter judgment for the plaintiff in the sum of RM116,700 as damages for repudiatory breach and not as damages on any unpaid deposit or as a debt unconditionally due and payable prior to the acceptance of the repudiation. To my mind, the error that the learned judge committed was to adopt the sum of RM116,700 labelled as a deposit in cl 3, as the true measure of damage without the need for the plaintiff to prove any loss or damage under s 74 of the Contracts Act 1950. That seems to be the basis of his judgment, as shown in the concluding pages of his grounds of decision:

> Dalam kes *Damon Compania Naviera SA v Hapag-Lloyd International SA, The Blankenstein, The Bartenstein, The Birkenstein* [1985] 1 All ER 475 Mahkamah Rayuan membenarkan pengembalian deposit sepenuhnya walaupun kerugian sebenar yang ditanggung oleh si penjual adalah kurang daripada jumlah deposit. Mahkamah di dalam kes tersebut menimbangkan bahawa ukuran kerugian adalah jumlah deposit tersebut.
>
> Oleh hal yang demikian, saya berpendapat bahawa si plaintif tidaklah perlu mengurangkan kerugiannya dan dengan itu lagi sekali saya berpendapat bahawa hujah bertulis peguambela pihak defendan bertarikh 27 Julai 1993 mengenai perkara ini adalah tidak relevan.
>
> Pada akhirnya, dengan alasan di atas saya, memberikan penghakiman kepada si plaintif dan kerananya tuntutan si plaintif dalam pernyataan tuntutannya bertarikh 1 April 1986:
>
> '(b) damages for repudiation of the said agreement amounting to RM116,700 being 10% of the contract price; and
>
> (c) interest on the amount found to be due to the plaintiff at 8%pa commencing on 13 September 1984 until settlement; and
>
> (d) costs'
>
> dibenarkan.

As stated by Lord Goddard in the case of *Bonham-Carter v Hyde Park Hotel Ltd* [1948] WN 89 and approved by Thomson CJ in *Lee Sau Kong v Leow Cheng Chiang* [1961] MLJ 17 at p 20 and followed in *Popular Industries Ltd v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360 at p 369:

> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars, and so to speak, throw them at the head of the court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it.

In the instant case, no part of the machinery had been supplied or installed and whatever claim under special damages had already been abandoned, and as such to use the words of Edgar Joseph J (as he then was) in *Popular Industries*: 'It is axiomatic that a plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover'.

For my part, the normal measure of damage in a contract of sale of machinery is the difference between their contract and market values. There is no reason in this case, having regard to the pleadings, to depart from the ordinary measure of damages. To quote the words of Robert Goff LJ in *Damon Compania Naviera v Hapag-Lloyd International SA* [1985] 1 All ER 475 at p 492; [1985] 1 WLR 435 at p 456:

> To award the sellers damages assessed on the basis of the amount of the deposit would be to compare their present position with what their position would have been if the contract had only been partially performed (ie the deposit paid), and not with their position if the contract had been performed in full; if damages were assessed in that way, they would be over-compensated for the loss of their bargain.

This principle against over-compensation seems to have been followed by the Federal Court in *Tan Sri Khoo Teck Puat & Anor v Plenitude Holdings Sdn Bhd* [1994] 3 MLJ 777. Again, in *Lyon v Magnet Nominees Pty Ltd* [1978] VR 673 at p 676, Harris J in the Supreme Court of Victoria had this to say:

> I respectfully consider that what was decided in *Lowe v Hope* [1970] Ch 94; [1969] 3 All ER 605 and *Johnson v Jones* (1972) NZLR 313, is correct in law and I adopt what is set out in the headnote to *Lowe v Hope* as a correct statement of the law.
>
> Counsel for the defendant relied upon what was said by Dixon J (as he then was) in *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at pp 476–478. What his Honour did in that passage was to point out that, when a contract is dissolved at the election of the party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and that the party in default was liable for damages. However, he went on to hold that, under an instalment contract for the sale of land, a vendor who rescinds in such a way, is not entitled to sue for any unpaid instalments of purchase money. Far from supporting the defendant's case, in my opinion, the statement of the law by Dixon J is against the defendant, although it deals with instalments of purchase money and not the deposit. If instalments of purchase money are not recoverable by a vendor, then the deposit, or an

unpaid part of the deposit, could only be recovered if it could be said that the vendor could do this in order to enable him to forfeit the sum when received. In my opinion, the reasoning in *Lowe v Hope* rightly precludes this being done.

For these reasons, I hold that the claim of the defendant to recover the unpaid parts of the deposits must fail.

With respect, I do not think it desirable and proper for this court to treat the plaintiff's action other than the way the parties had pleaded and argued in the court below, as it is clear that this case does not come under any of the exceptions to the strict rule of pleadings. From the arguments in the court below, the sum total of the plaintiff's case was to treat the sum labelled as 'deposit' in cl 3 of the agreement as the measure of damage suffered by them. On the facts and circumstances of this case, I believe this is contrary to s 74 and therefore wrong in law.

Although the learned judge was correct in law in treating the case as a claim in damages for repudiation of contract, I am of the view that the reliance by the learned judge on the majority judgment in *Damon Compania Naviera SA v Hapag-Lloyd International SA* in adopting the so-called deposit of RM116,700 as the proper measure of damages is contrary to the statutory requirement of s 74 of the Contracts Act which clearly requires the plaintiffs to prove their loss or damage. Further in *Damon*'s case, the fact that the deposit was a true deposit was not at all in dispute. In that case, Damon failed to sign the memorandum and to pay the deposit as stipulated and the sellers had withdrawn from the contract and reserved all their rights for compensation and loss. It was held by majority (Robert Goff LJ dissenting) that the seller's right to damages in the amount of the deposit was unaffected by Damon's repudiation of the contract. As adverted to earlier, unlike *Damon*, there are no similar words or expression used in the instant agreement to indicate that the deposit is a true deposit. As such, the measure of damage adopted by the majority decision in *Damon* is not only distinguishable on the terms used in the agreement, but also contrary to s 74(1) of the Contracts Act which has expressly limited the measure of damages to compensation for any loss or damage caused thereby to the innocent party, by proof of such loss or damage which normally arose in the usual course of things from the breach, or which the parties knew, when they made the contract to be likely to result from the breach of it. (See *Central Malaysia Development & Co Ltd v Chin Pak Chin* [1967] 2 MLJ 174 at p 177.) In my view, common law authorities in other jurisdictions on the seller's right to unpaid deposit as damages should not be accepted without regard to our s 74.

In any event, any discussion on the entitlement of the plaintiff in law to payment of a deposit not yet paid would be mere obiter in the absence of any pleading to that effect and in the absence of any finding by the learned trial judge that the deposit under consideration is a true deposit. The onus of proof in establishing the existence of a true deposit lies no doubt with the plaintiff and that onus has not been discharged. The true deposit issue is their first hurdle to a successful claim for unpaid deposit and they cannot be allowed to jump the second hurdle unless they have

cleared the first hurdle. With respect, this court ought not to rectify the serious defect in the reasoning of the learned trial judge by substituting a fresh cause of action and a fresh finding on his behalf and accepting the labelling test as sufficient, in lieu of applying the principle of construction of the words and expression used within the four corners of the sale and purchase agreement.

Thus having correctly held that s 75 of the Contracts Act 1950 did not apply in this case, the learned judge ought in my view to have applied s 74 and required evidence to be led for loss or damage to be proved and assessed. Having failed to construe that the deposit in cl 3 is a true deposit, he ought not to treat the sum of RM116,700 as liquidated damages or as the measure of damage for breach of contract without any proof of loss or damage. In my opinion, this court should not assist the plaintiff to manoeuvre their claim at the appellate stage to one as if it were for recovery of a deposit not yet paid, and as if there were no dispute as to the true nature of the word 'deposit' in cl 3.

Going back to the subject of a true deposit, it is explicit from the authorities referred to by the learned judge in his grounds of decision, that in law a deposit can either be intended only for payment towards the purchase price, or it can be for the dual purpose of guaranteeing performance in addition to payment towards the purchase price. Thus in *Sun Properties Sdn Bhd & Ors v Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711, the Supreme Court had the occasion to consider the following deposit clause contained in a contract to purchase shares:

> 1 In consideration of the sum of Malaysian Ringgit one million (RM1,000,000) only now or heretofore paid to the vendors by the purchaser as deposit and towards account of the purchase price (the receipt whereof the vendors hereby expressly acknowledge) the vendors hereby sell and the purchaser hereby purchase the said shares free from encumbrances at the total purchase price of Malaysian Ringgit ten million (RM10,000,000) only.

The crux of the matter in that case was also whether the sum of RM1m was a true deposit or merely a deposit towards the purchase price. It was held that the clause contained the standard expression used to show the dual purpose of a true deposit. In holding that the deposit was a true deposit, Hashim Yeop Sani SCJ had this to say at p 713:

> The expression used in cl 1 of the sale agreement in the instant case is a standard expression used in all sale agreements where money is paid as a deposit and part payment of the purchase price. The expression 'as a deposit and part payment of the purchase money' always relates to the two alternatives that in the event of the purchaser making default the money is to be forfeited and that in the event of the purchase being completed the sum is to be taken as part payment. A deposit is not merely a part payment but is also an 'earnest' money to bind the bargain entered into and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract — see *Howe v Smith*. The deposit therefore serves two purposes, that is, if the purchase is carried out it goes against the purchase money but the primary purpose for the deposit is to act as a guarantee that the

purchaser means business — per Lord MacNaghten in *Soper v Arnold* (1889) 14 App Cas 429.

In this particular sale and purchase agreement under consideration, there is no such clause containing a standard or other similar expression to show either expressly or by necessary implication the dual purpose of the deposit except for the solitary word 'deposit' in cl 3. There is also no liquidated damages clause; nor is there a penalty clause. If there had been a liquidated damages clause or penalty clause, then in the event of breach the innocent seller would have been entitled under s 75 of the Contracts Act to reasonable compensation not exceeding the agreed sum. In my opinion, to qualify as a true deposit, the contract should contain words or expression capable of being construed that the parties intended that the deposit be for a dual purpose not only as a guarantee of performance, but also as part payment towards the purchase price. As such, whether a deposit is a true deposit cannot depend on the mere labelling of the word but must by necessity depend on the construction of the words and expression used in the particular contract of sale and purchase. As observed by Lord Hailsham LC in *Linggi Plantations*, there is a danger of relying solely on the labelling of the word 'deposit' when he said at p 94:

> It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposits properly so-called and even to forfeiture which turn out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty, by purporting to render forfeit something which is in truth part payment.

Earlier at p 93, Lord Hailsham had this to say on the need to construe the contract before a deposit could be held to be a true deposit:

> It follows, therefore, that, once it is decided that the construction of the contract is such that the sum of RM377,500 was paid as a true deposit, that is, on the same terms as the deposit in *Howe v Smith*, and was thus to be liable to forfeiture under the contract, in case of failure by the purchaser to complete, s 75 of the Contracts (Malay States) Ordinance can have no application when the contract is properly terminated and the deposit is forfeited whether or not damage is proved.

In construing the word 'deposit' in cl 3 of the sale and purchase agreement, it is essential that the basic principle of construction as laid down by Parke LJ in *Ford v Beech* (1848) 11 QB 852 at p 866, be borne in mind:

> ... the conunon and universal principle ought to be applied: namely that it ought to receive that construction which its language will admit, and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and that greater regard is to be had to the clear intent of the parties than to any particular words which they may have used in the expression of their intent.

This principle has been consistently followed in our courts (see *Jagatheesan*'s case [1969] 2 MLJ 253 at p 256, FC; *Karuppiah v Petaling Garden Co Sdn Bhd* [1972] 1 MLJ 11 at p 12 which was upheld in [1972] 1 MLJ 173,

FC). On this common and universal principle of construction, it seems clear that the mere labelling of the word 'deposit' in cl 3 cannot be taken as sufficient proof that the parties intended the payment for a dual purpose, which is an essential prerequisite of a true deposit.

Whether a deposit is a true deposit is therefore a matter of construction and not of mere labelling of the word. Contrary to the authorities already cited, the learned judge in this case completely failed to direct his mind on whether the 'deposit' referred to in cl 3 of the agreement could be construed as a 'true deposit', as laid down by all the authorities. The failure to carry out proper investigation and to make any finding on this vital issue is fatal. In my opinion, this court ought not to rectify such serious error, short of ordering a retrial, which in the circumstances would be unjust to the appellant.

The plaintiff in this case has successfully argued in the court below that they are entitled to general damages for repudiation of the contract on the basis of 10% of the purchase price being the first down payment of RM116,700 under cl 3 (though not yet paid) as a true measure of their loss and damage without having to prove them under s 74 of the Contracts Act. Contrary to their pleading in the court below, they also now wish to argue that the unpaid sum of RM116,700 agreed to be paid on the signing of the contract was a deposit capable of being recovered as damages without proof of loss or damage.

In either event, I am of the opinion that the plaintiff's claim must fail; in the first case on the ground that the learned judge erred in law in adopting the sum agreed as the first down payment under cl 3 as the measure of general damages instead of being assessed in the normal way under s 74 Contracts Act on the basis of established principles of assessing damages in breach of contract cases; and in both the cases, on the ground that the learned judge erred in law, in failing to investigate and properly construe whether the word 'deposit' in cl 3 relied upon, is a true deposit, and thereby failed to appreciate that the words and expression used in the agreement must expressly convey the intention of the parties on the dual purpose of the deposit, or that such intention could be plainly inferred from the four corners of the agreement. By leaving the matter hanging and undecided, it constitutes an error which goes to the root of this appeal, and it is too late now for this court to repair the serious omission.

In his oral submission in the court below, counsel for the plaintiff seemed to suggest that the statement of claim was in respect of unpaid deposit and not a claim for damages. This cannot be so on the plain reading of the statement of claim. Be that as it may, whether it is one or the other, I am of the opinion that in this particular case, s 74 would apply. A claim for forfeiture of paid deposit for breach of guarantee to perform is quite clear on the authorities already referred to. A forfeiture is only possible when the deposit has been paid by the buyer at the time when the repudiation of the contract is accepted by the seller, ie when the contract has been partly performed by such payment. But the law governing a claim for unpaid deposit on the basis that the measure of damage is the amount

of deposit agreed to be paid, is a comparatively new development of the law on assessment of damages. It is still unsettled in other common law jurisdictions. In my opinion, it ought not to be imported hastily to this country without any regard to the pleadings and to our s 74 which requires proof of loss or damage in all cases of the present nature. The crux of the matter here is not so much the quantum of damages as the total absence of proof of any loss or damage suffered by the plaintiff.

In any event, going strictly by the appeal record, there is no way the plaintiff company could possibly avoid their fundamental duty of proving their actual loss or damage under s 74 of the Contracts Act, in a claim for damages 'for repudiation' of the contract. It goes without saying that in the absence of proof of any loss suffered by the plaintiff, the question of measure of damage could not arise at all; nor could the damage be arbitrarily assessed at 10% of the contract

The appeal should therefore be allowed with costs both here and in the court below.

Order accordingly.

Reported by Prof Ahmad Ibrahim